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PERSPECTIVE

Beyond Anthropocentrism: Health Rights and Ecological Justice

HIMANI BHAKUNI

Introduction

Almost two decades ago, in light of mounting evidence of the extinction of various species and biodiversity hotspots, Brian Baxter, in *A Theory of Ecological Justice*, argued that we should expand our community of justice to include all sentient and non-sentient beings.¹ This essentially means that biotic and abiotic nonhumans have a claim in justice against moral agents. This broader notion of ecological justice defended by Baxter entails that humans as moral agents must not deprive (at least not without a stronger moral reason) sentient and non-sentient beings of the environmental basis of their continued existence and ability to reproduce themselves.² While much can be said about the plausibility of Baxter's account, ecological justice remains a rather misinterpreted notion, especially when employed by advocates who rely on its normative significance to push for better outcomes for human health and, in doing so, conflate ecological preservation with ecological justice. While these advocates are accurate in linking human health and ecological preservation, ecological justice requires a viewpoint that goes beyond anthropocentrism—where human health is not *above* the health of nature. In this piece, I suggest that the idea of ecological justice, along the lines proposed by Baxter, can help us develop a more robust notion of health rights.

At face value, the existing health rights framework *seems* to be geared toward a broader community of justice, which may lead one to question the very intelligibility of providing a *more* robust notion of health rights. For example, the right to a healthy environment under article 12(2)(b) of the International Covenant on Economic, Social and Cultural Rights requires state parties to improve “all aspects of environmental and industrial hygiene.”³ But this face-value impression is misleading. Environmental and animal health finds a mention in the right to health framework not because of the recognition that *all* nonhuman entities on this planet might have a reasonable claim to health (in and of themselves); rather, these entities are included in the framework on purely *instrumental* grounds: they are protected only to the extent that their lack of health would affect human well-being.

By treating the health of biotic and abiotic environments non-instrumentally, not only would we take steps toward fostering ecological justice, but the expansive health rights framework would become richer by treating the health rights of biotic and abiotic nonhumans on an equal footing with the human right

HIMANI BHAKUNI is an assistant professor of justice in global health research at University Medical Center, Utrecht University and a lecturer in law at Maastricht University, Netherlands.

Please address correspondence to the author. Email: H.Bhakuni@umcutrecht.nl or H.Bhakuni@maastrichtuniversity.nl.

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to health. The jurisprudential theory around the rights of nature (RoN) has taken the initial steps by extending the rights created for humans and other legal entities to nature. RoN theory focuses on the rights of ecosystems to exist, persist, flourish, and regenerate regardless of the benefits to humans or corporations.⁴ RoN are usually sought by extending personhood to formerly excluded aspects of non-human nature (including environmental support systems).⁵ The recognition of RoN is important for modern legal systems because any applied effort in achieving ecological justice requires human rights to work in tandem with RoN to ensure that the interests of nature are not (so easily) defeated when they conflict with the rights and interests of other subjects of law.

The link between human rights, rights of nature, and legal protection

Hernán Santa Cruz, a Chilean member of the drafting subcommittee of the Universal Declaration of Human Rights, wrote that the consensus on recognizing and institutionalizing human value “did not originate in the decision of a worldly power, but rather in the fact of existing.”⁶ Similarly, nature’s rights arise from the existence of nature and from it being a thing of value. If we accept RoN and the premise that nature and things can be ascribed rights, then we can make a case for ascribing a right to health to biotic and abiotic nonhumans.

The dialogue around RoN has rested on the idea that in order for nature to have rights, it must be ascribed some sort of personhood. This idea has increasingly been contested in recent literature, along with the idea that the concept of “person” is not necessary even for human rights.⁷ In law, when we attribute personhood to a thing, “we do nothing more than recognize an entity as a valid object of legal concern.”⁸ This is seen in legal personhood ascribed to corporations, states, embryos, fetuses, brain-dead patients, rivers, dolphins, and so forth. The term “person” then stands not for a single concept but for a “cluster of ideas” that is usually relative to a given situation.⁹ Sometimes we might use “person” to talk about rational agents, sometimes

the word might highlight a biological composition, occasionally the term is used to signify continuity of consciousness, and other times we use it as a normative idea that denotes a holder of legal entitlements and burdens.¹⁰ In order to avoid confusion between these uses of the term, and to circumvent the unending debates around personhood, some scholars prefer using the term “nonhuman subjects of law” to talk about all nonhuman things that hold certain legal entitlements.¹¹

A human person is primarily capable of holding all types of rights, be they rights that protect their interests or those that protect their freedoms. But nonhuman subjects of law are capable of holding only those rights that predominantly protect their interests. Incorporating RoN into our legal systems, whether through legal personhood or through non-personal subjecthood of law, for all practical concerns “may be reduced to the legal recognition of one single right only, namely the right to be taken into account, or ... to have one’s own individual interests considered as relevant in all decisions that may affect their realization.”¹² This, when stretched further, essentially means that these interests can be compromised or defeated if they conflict with the rights and interests of other subjects of law. Such legal protection remains at the mercy of the anthropocentric idea of the “common good.” Conflicts between two sets of rights-bearers are usually resolved in the name of and for the common good, which might come at the cost of the interests of nature.

If we are to pursue ecological justice earnestly, we need stronger protections of the interests of nature—where the interests of nonhuman subjects of law are not deemed lesser when weighed against the immediate or long-term interests and freedoms of humans. Here, “interests of nonhumans” should be read as acts and omissions that would be advantageous to their existence, persistence, regeneration, and flourishing. And “nonhuman subjects of law” should be read as all sentient and non-sentient (biotic and abiotic) planetary existence. Note that whether nonhumans can have rights or even an interest in liberty is a morally contentious notion.¹³ While much has been written about the capacity

of animals to possess rights and freedoms, there is significantly less scholarly work on the rights and freedoms of non-sentient or abiotic systems. Legally, the interests of nonhumans can be protected through legislation and regulation. But the proponents of RoN seek perpetual court protection of the interests of nature irrespective of any legal standing. Before I outline how the legal protection of the interests of nature is in the process of being accomplished, let me first clarify what I mean when I say that all sentient and non-sentient nonhumans also have a claim to health.

All sentient and non-sentient beings have a non-instrumental claim to health

Decades ago, Aldo Leopold's pioneering notion of land ethic unequivocally recognized nature's "right to continued existence" and aimed to amend the position of "Homo sapiens from conqueror of the land-community to plain member and citizen of it."⁴ This progressive idea for its time finds deep resonance with the notion of ecological justice as propagated by Baxter, who claims that humans as moral agents must not rob sentient and non-sentient beings of the environmental basis of their continued existence and ability to reproduce themselves.⁵ Building on this, I propose that a claim of these beings to health, or a right to health, would then entail a right to a state of security where non-sentient nonhumans (like the abiotic elements of our ecosystem) can continue to exist in a meaningful state where they can support the safe reproduction and preservation of sentient human and nonhuman beings.

The right to health for all biotic and abiotic nonhumans requires further clarification. First, this would essentially be a *claim right*, meaning a right that would entail responsibilities, duties, or obligations on humans regarding the right-holders (who would be all sentient and non-sentient nonhumans). Second, to continue to exist in a *meaningful state* is distinct from simply continued existence. A "continued existence" for the abiotic elements of the ecosystem could very well mean a polluted or value-less existence. To avoid this interpretation, a

right to health for the abiotic environment would necessitate a meaningful existence that would support the safe reproduction and preservation of the biotic environment. Third, like the human right to health, the right to health for all biotic and abiotic nonhumans would be subject to progressive realization by states where they "would have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization" of the right.¹⁶ Given that our biotic and abiotic nonhuman environment is in an extreme state of distress, it would require sustained efforts to undo the damage and to refrain from doing further damage by humans individually and by states.

It is important to note that while the right to health of biotic and abiotic nonhumans is similar to the human right to health, rights that are derived from existence are unique to different kinds of beings. Thomas Berry has argued that rights "are species specific and limited" (like bird rights, river rights, and human rights) and that the difference between human rights and other species-specific rights is "qualitative, not quantitative."¹⁷ Earlier, I mentioned how, in the legal rights landscape, the interests of some can be defeated in pursuit of others, but it is equally true that human rights and RoN can be "co-violated."¹⁸ For instance, between the years 1967 and 1992, the pollution caused by Texaco's oil drilling operations in the Ecuadorian Amazon resulted in widespread incidents of miscarriages, birth defects, and cancer deaths. The operations also resulted in 18 billion gallons of toxic wastewater and pollutants being released into the local waterways, which severely damaged a once pristine rainforest (teeming with rich biodiversity) and caused an estimated one million acres of deforestation.¹⁹ Thus, the same government-backed industrial action that violated the human rights to life and health also violated the health rights of abiotic and biotic nonhuman natural systems.

The onward struggle for ecological justice

There have been leaps and gains in recognizing RoN across different jurisdictions and levels of government, but one approach to ascribing legal

rights to nature has arguably been more successful than the other. The first approach—let us call it the “legal personhood approach”—has faced certain problems. For instance, the Indian High Court of the State of Uttarakhand, after invoking its *parens patriae* jurisdiction and granting provincial authorities the legal guardianship of the abiotic systems, declared

glaciers including Gangotri and Yamunotri, rivers, streams, rivulets, lakes, air, meadows, dales, jungles, forests wetlands, grasslands, springs and waterfalls, legal entity/legal person/juristic person/juridical person/moral person/artificial person having the status of a legal person, with all corresponding rights, duties and liabilities of a living person, in order to preserve and conserve them.²⁰

This order was suspended by the Indian Supreme Court after the provincial authorities filed an appeal, arguing that the order was legally unsustainable and untenable. In their appeal against the High Court’s order, the provincial authorities presented two problems with the order:

- First, things such as rivers run across different territories and provincial borders, and by virtue of the provincial authorities being declared legal guardians of the rivers, they would unreasonably be sued in any illegality involving the rivers, even if it was committed in other provinces. Given that local authorities do not have the power to pass instructions to authorities and people in other provinces, the order was unimplementable.
- Second, if rivers, lakes, and so forth have duties, then it would be possible to bring a claim against them, and that would be legally unsustainable.²¹

One can assume that the latter query was along the lines of, how could the river’s right to flow without inhibition be reconciled with a duty to provide hydropower electricity to the people living by the riverbanks? This has to be read in light of the fact that the River Ganga is one of the most engineered rivers in the world.

Ascribing legal personhood to rivers (or sys-

tems) possibly has greater impact when the river (or system) in question is less engineered and has a protected status, such as the Whanganui River in New Zealand.²² The protection of the interests of the abiotic and biotic nonhuman entities would perhaps be more successful if they were *only* ascribed claim rights. If states agree to the protection of their claim to health, as outlined before, the claim would be subject to progressive realization by national and local governments, making it logistically less burdensome for them. Nevertheless, given how some of our legal systems actually function—assuming that ascribing rights or personhood must be followed by ascribing duties as well, when actually one need not entail the other at all (like how some legal systems ascribe newborns claim rights with no duties)—their claim to health would remain at risk of being outweighed by more pressing human claims and freedoms.

The second approach—let us call it the “constitutional approach”—has been slightly more successful than the first. In 2008, Ecuador amended its Constitution to include a recognition that “[n]ature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.”²³ The Constitution further adds that any person can enforce these rights by calling on public authorities for the observance of such rights and that nature’s right to be completely restored is independent of the obligation to compensate people affected by the deterioration of natural systems.²⁴ A fairly recent empirical study compared 13 RoN lawsuits in Ecuador to analyze the pathways and strategies that were used by RoN advocates and opponents to build, and counter, the force behind judicial processes that were meant to bolster the enforcement of RoN norms.²⁵ These were a mixed bag of successful and unsuccessful lawsuits. Among influential pathways that included interdependent processes between state agencies, civil society, and the courts, the study found that the civil society pathway was the least successful, as many activists lost lawsuits that were highly publicized. But these high-profile cases “facilitated judicial mo-

mentum by working on less-politicized local cases and training lower-level judges.²⁶ When the local governments used the constitutionally enshrined RoN laws instrumentally (or rather hypocritically by invoking them when they served a purpose and ignoring them when they challenged government policies), it produced inadvertent consequences, including the establishment of precedent and the education of judges. Further, the study found that well-informed judges were unilaterally applying RoN in their orders, even when neither claimants nor defendants alleged violations of RoN.²⁷

The two approaches to ascribing legal RoN are different in their scope and implementation. We are still at an early stage of the RoN movement, but the movement is progressing at a steady pace. As of 2021, 13 countries have recognized some form of RoN.²⁸ My proposal of a right to health for biotic and abiotic nonhumans requires further refinement, but if recognized as nature's distinct claim to health, it would transform and enrich the more expansive health rights framework.

Currently, there is a bombardment of too many ideas, and too few strategies, concerning the protection of our ecosystem, which has prompted some scholars to pronounce that the “dialectic of justice has reached an impasse in which the struggle over ideas—though present in abundance—has come to have very little effect on real human-human and human-nature relations.”²⁹ Here, I have proposed one possible legal strategy of ascribing a right to health to biotic and abiotic nonhumans, which (depending on the legal approach taken) has the potential to secure some aspects of ecological justice. But as long as we continue to feed our moral imagination with the Leopoldian idea that “[a] thing is right when it tends to preserve the integrity, stability and beauty of the biotic community. It is wrong when it tends otherwise,” we might be on the right track.³⁰

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